

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**  
**WRIT PETITION NO. 463 OF 2006**

Smt. Sulekha Ahmed Shaikh & ors. ... Petitioners

V/s

Smt. Krishnabai Baban Rajge & ors. ... Respondents

Mr. S. K. Chaturvedi i/by Chaturvedi & Associates for  
the petitioners.

Mr. P.M. Havnur for the respondents.

**CORAM: P.V. KAKADE, J.**

**DATED: 3RD APRIL, 2006**

**P.C.:**

1. Heard learned counsel for both parties. Perused the record.

2. Rule. Rule made returnable forthwith.

3. The petitioner defendant has moved this petition against the order dated 3.10.2005 passed by the revisional Court dismissing the revision application against the order passed by the Trial Court dated 17.6.2005 discharging the notice for amendment.

4. The notice was taken out by the defendant No.1 (e) submitting that the original plaintiff had filed the suit for eviction against the defendant and during the pendency of the suit, the original plaintiff has died and legal heirs are brought on record. Even during the pendency of the suit, the original defendant expired leaving behind him the present defendant Nos. 1(a) to 1(j) who are already brought on record. The original defendant had filed his written statement on 25.9.1979. Thereafter additional written statement was also filed. Issues were framed in the year 1999 and evidence of plaintiff was over and defendants' evidence was about to commence when the application for amendment was moved challenging the maintainability of the suit on various grounds.

The Trial Court relying upon the proviso of Order 6 Rule 17 of C.P.C. came to the conclusion that the application for amendment did not fit in the said proviso. The proviso reads thus -

"Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the

party could not have raised the matter before the commencement of the trial."

5. Therefore the Trial Court was of the view that the defendant had not raised the point of jurisdiction at the earliest opportunity. The suit was of the year 1999 and evidence of the plaintiff was over and proposed amendment would not decide the controversy in the suit and hence the application came to be rejected.

6. The revision was preferred. The revisional Court was of the view that respondent did not satisfy the Court on the point that inspite of due diligence they could not raise the said plea before commencement of the trial. It was also observed that the original deceased defendant has submitted to the jurisdiction of the Court by applying for fixation of the standard rent of the suit premises and, therefore, the legal heirs now should not say that this Court had no jurisdiction to try and decide the suit.

7. The learned counsel for the petitioner submitted that legal heirs who were brought on record after death of original defendant have filed the additional written statement but due to change of their advocate they could

not take the defence of question of maintainability of the suit itself.

8. Firstly, it must be noted that even though the original defendant had filed an application for fixation of standard rent, that does not mean that he was legally estopped from raising the issue of maintainability of the suit which was based on various grounds. Be that as it may, the fact on record shows that the evidence of the defendant is to start. Moreover, it is not the case of the respondent nor the Courts have observed that the amendment sought for is either irrelevant or may change the cause of action. In fact, the question of maintainability sought to be raised would go to the root of the matter and, therefore, it is needless to mention that such amendment should have been granted by the Trial Court and further should have raised additional issue after giving opportunity to the other side to file additional written statement.

9. It is needless to mention that the law is very settled on this point that the amendment can be carried out at any juncture of the on going trial or even at the stage of appeal and, therefore, the view taken by the Courts below appears to be erroneous to the effect that

the defendant has not acted with due diligence.

10. Under the circumstances, the Rule is made absolute. The orders passed by both the Courts below are set aside. The application for amendment filed by the defendant is allowed.

The Trial Court shall allow the petitioner to amend the written statement and thereafter raise the relevant issue and give opportunity to other side to file additional evidence, if any, before the commencement of the evidence of the defendant confined to the additional issue to be raised by the Trial Court.

All this exercise shall be completed within two weeks from the date of this order and both parties shall cooperate with the Trial Court.

The amendment to be carried out within one week from the date of this order.

12. In the result, the petition stands disposed of with no order as to costs.

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